In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-795

MAURICE McKINNEY TAYLOR,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

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Petitioner, Maurice McKinney Taylor, prays that a writ of certiorari be granted to review the judgment of the Court of Criminal Appeals of Tennessee entered in this case on June 9, 1976.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Tennessee is not yet reported and is reprinted in the Appendix hereto at page A1. The order of the Supreme Court of Tennessee of August 16, 1976 denying Petitioner's Petition for Certiorari is reprinted in the Appendix at page A10. Mr. Justice Stewart's order extending the time for filing this Petition for Certiorari to December 14, 1976 is reprinted in the Appendix at page A11.

JURISDICTION

The judgment of the Court of Criminal Appeals of Tennessee was entered on June 8, 1976. The Petition for Certiorari to the Supreme Court of Tennessee was denied on August 16, 1976. Mr. Justice Stewart, by order entered on November 10, 1976, extended the time for filing the Petition for Certiorari to this Court to December 14, 1976. This Court has jurisdiction under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. WHETHER THE OPINION OF THE COURT OF CRIMINAL APPEALS SHOULD BE REVIEWED BY THIS COURT: (a) BECAUSE THE COURT DECIDED THIS CASE IN A WAY PROBABLY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT, TO-WIT: THIS COURT HAS NEVER HELD THAT A "HARMLESS ERROR" RULE IS APPLICABLE TO VIOLATIONS OF RIGHTS GUARANTEED UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, *E.G., MAPP V. OHIO,* 367 U.S. 643 (1963); (b) BECAUSE THE COURT HAS DECIDED A QUESTION OF SUBSTANCE NOT HERETOFORE DETERMINED BY THIS COURT, TO-WIT: THE COURT DECIDED THAT IN CASES INVOLVING VIOLATIONS OF RIGHTS GUARANTEED UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION THE RULE WHICH MAY HAVE BEEN STATED BY THIS COURT IN *FAHY V. CONNECTICUT,* 375 U.S. 85 (1963), WOULD GOVERN THE FACTS OF THIS CASE, RATHER THAN RULES WHICH HAVE BEEN STATED IN TWO OTHER CASES BY THIS COURT, NAMELY, *CHAPMAN V. CALIFORNIA,* 386 U.S. 18 (1967), AND *HARRINGTON V. CALIFORNIA,* 395 U.S. 250 (1969).

2. WHETHER THE OPINION OF THE COURT OF APPEALS (a) DECIDED A FEDERAL QUESTION OF SUBSTANCE IN A WAY PROBABLY NOT IN ACCORD WITH AN APPLICABLE DECISION OF THIS COURT, NAMELY, *POINTER V. TEXAS,* 380 U.S. 400 (1965) IN THAT THE TRIAL COURT IN THIS CAUSE ERRED IN NOT STRIKING THE TESTIMONY OF WITNESSES DUNN AND MASON IN WHOLE OR IN PART AFTER THEY ASSERTED THEIR FIFTH AMENDMENT RIGHTS NOT TO INCRIMINATE THEMSELVES; (b) THE COURT OF APPEALS HAS DECIDED A QUESTION OF SUBSTANCE NOT HERETOFORE DECIDED BY THIS COURT, NAMELY, WHETHER IT IS PROPER TO APPLY A HARMLESS ERROR RULE, OR WHETHER THE PROPER REMEDY IS TO STRIKE THE TESTIMONY OF THOSE WITNESSES WHO ASSERT THEIR FIFTH AMENDMENT RIGHTS WHILE TESTIFYING AGAINST AN ACCUSED.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. V

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

U.S. CONST. amend. VI

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

U.S. CONST. amend. XIV, Sec. 1

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a Petition for Writ of Certiorari presented by Petitioner who was charged in the Davidson County Criminal Court, Division 2, Nashville, Tennessee, with murder in the first degree, being charged in the deaths of James Widener and Mildred Hazlewood (TR pp. 3, 4; BE p. 529).[1] Defendant was found guilty by a jury of both counts of murder and sentenced to concurrent terms of life imprisonment (BE pp. 565-566).

The State's evidence was bottomed upon circumstantial evidence, there being no witnesses produced who saw the demise of James Widener and Mildred Hazlewood. The latter two persons were found dead in an alley in downtown Nashville, Tennessee around 10:00 P.M. on November 27, 1973 (BE pp. 50-57; 58-62; 86). The victims died from gunshot wounds (BE pp. 100-108; 110-114). The investigation of the authorities revealed that Petitioner

1. The Technical Record (hereinafter "TR p. ....") in this cause is numbered pp. 1-..... and consists of the pleadings, minute entries and orders of the Court, notice of appeal, and other record entries. The Bill of Exceptions (hereinafter "BE p. .....") consists of pp. 1-569 and is the record of the trial testimony of the witnesses and the other proceedings in the trial court.

(hereinafter "Taylor" or "Defendant") was seen in the general area of the crime near the motel where Mrs. Hazlewood was registered on November 27, 1973, at about 9:00 P.M. In fact Taylor was observed in the same restaurant where the victims had dinner prior to their deaths (BE pp. 227-232). Thereafter, Defendant, a Negro male, was observed with two other Negro males in Memphis, Tennessee several days after the murders, doing the following:

Defendant was observed with Dunn and Mason, the other Negro males, using Widener's Master Charge credit card to purchase an airline ticket, although Taylor did not himself use the card (BE pp. 247-253); Taylor, Dunn and Mason, on or about 3:00 P.M. on November 29, 1973, were observed in Memphis Sears & Roebuck Store where several purchases were made by Dunn, using Widener's Sears charge card; after a purchase was made which required further checking by the store, Dunn produced by way of identification the car title to Widener's car and Widener's Master Charge card; whereupon, the police were called, and the three fled in Widener's automobile (BE pp. 256-273; 277-280). During the day of November 29, 1973, Widener's automobile was parked in a Memphis parking lot (BE pp. 283-289). About 3:00 P.M. in Memphis on November 29, 1973, police officers arrested Taylor, Dunn and Mason in a Memphis Motel after a shootout, and at the scene of this fracas found a gun which was ultimately shown to be the murder weapon and a coin purse, ring and watch belonging to the victims (BE pp. 289-346; 362-376; 47-48; 71-74).

Subsequently, Dunn and Mason decided to become witnesses against Taylor, and they testified that although Taylor never told them he had killed Widener and Mrs. Hazlewood, he was gone from the motel room the three

were sharing in Nashville the day and time of the murders; that shortly after the time of the murders, Taylor was excited, told the others that everyone had to leave town immediately; that thereupon the three left in Widener's automobile, went to Memphis, Tennessee, parked the car in Memphis and used Widener's credit cards in Memphis. The two further testified that the murder and two other weapons had been purchased prior to the murders in Atlanta, Georgia; the two further testified that on the evening of the murders Taylor had fired his weapon into the ceiling of their motel room in Memphis (BE pp. 405-421; 458-488). The State also called witnesses to corroborate Dunn and Mason's story with regard to the firing of the weapon into the ceiling of the motel room (BE pp. 511-514; 517-522), and with regard to the purchase of the weapons, including the murder weapon (BE pp. 5-29). Taylor's fingerprint was said to be "lifted" from a glass which was found in the motel room occupied by one or both victims prior to their deaths (BE pp. 119-125; 136-184).

Defendant offered no testimony or evidence on his behalf (BE p. 528). Defendant's attorney in the trial court made no opening or closing statement (BE pp. 2; 528).

The State at trial attempted to introduce into evidence Exhibit 19, which was a coin purse, and Exhibit 20, which was a watch and ring, which the State showed belonged to the victims (BE pp. 47-49). The watch and ring were found in the coin purse, which in turn was found under a mattress in the motel room where Taylor was arrested (BE pp. 320-324). A keyring with an identification tag containing Widener's license plate number was also found in the motel room in a closed suitcase on the floor. Testimony about this evidence was also permitted (BE pp. 320-324). Defendant's counsel in the lower court made an oral

motion as to the admission of this evidence to exclude this evidence because there was no search warrant (BE pp. 311-312). The court thereupon excused the jury and held a hearing outside the presence of the jury (BE p. 312). Over objection, the evidence was admitted into evidence (BE pp. 320-324). The defendant assigned as error in his motion for new trial the admission of these items into evidence (TR p. 32), which was overruled by the court on January 3, 1975 (TR pp. 37-38). Thereafter, this point was presented to the Criminal Court of Appeals in Tennessee by brief and was decided adversely to Petitioner. Thereafter, Petitioner applied to the Supreme Court of Tennessee for a writ of certiorari and included as an assignment of error that this evidence was improperly admitted into evidence. After the Petition for Writ of Certiorari was denied, Petitioner has sought review of this issue in this Court.

During the direct examination of State's witness Dunn, the Assistant Attorney General asked Mr. Dunn a question with reference to his involvement in the purchases at the Sears & Roebuck Store in Memphis; Dunn asserted his Fifth Amendment right and the court sustained the Fifth Amendment privilege of Mr. Dunn (BE pp. 412, 413). Witness Dunn was asked on cross-examination why he left California in a hurry prior to coming to Tennessee. The court permitted the witness to assert his Fifth Amendment privilege with respect to that matter (BE p. 439). The court generally sustained the assertion of Dunn's Fifth Amendment privilege with respect to his activities in Memphis after the murders (BE pp. 443-450), to which ruling the Defendant excepted (BE pp. 447, 450). At the beginning of Mason's testimony, the court announced to the jury that an attorney representing Mr. Mason would be in the courtroom and that the attorney would be permitted "to

stand here and make proper objections, if any, to the questions that the State's lawyer asked him, questions involving constitutional rights to not give evidence against himself." (BE p. 457). Thereafter, the court announced it would make the same ruling in Mason's case as it had made with respect to Dunn's testimony, the court stating "so you can understand, we'll try to follow the same outline of rulings and permit the questions or not as I did this other witness." (BE p. 458). During direct examination of witness Mason, the court sustained the assertion of the Fifth Amendment privilege by witness Mason with respect to his activities in the Sears & Roebuck Store in Memphis (BE p. 84) and with respect to the question whether Mr. Mason was arrested with a gun in Memphis (BE pp. 487-488). During cross-examination, the court sustained the apparent assertion of the privilege of Mason with respect to (a) whether or not he fled California because he was charged with armed robbery (BE p. 493) and (b) whether or not he had ever carried false identification in California (BE pp. 498-499). (The defendant excepted to this latter ruling at BE p. 499.) Defendant assigned the limitations on cross-examination and the improper assertion of the Fifth Amendment privilege in his motion for new trial (TR p. 32), which was overruled by the court (TR pp. 37-38). Thereafter, the defendant raised the matter before the Court of Criminal Appeals of the State of Tennessee and in his Petition for Writ of Certiorari to the Supreme Court of Tennessee. After being overruled in both courts, he brings this Petition to this Court for certiorari for review of this issue.

REASONS FOR GRANTING THE WRIT

1. The Opinion of the Court of Criminal Appeals of Tennessee should be reviewed by this Court:

(a) Because the court decided this case in a way probably not in accord with applicable decisions of this Court, to-wit: this Court has never held that a "harmless error" rule is applicable to violations of rights guaranteed under the Fourth Amendment to the United States Constitution, *e.g.*, *Mapp* v. *Ohio*, 367 U.S. 643 (1963);

(b) Because the court has decided a question of substance not heretofore determined by this Court, to-wit: the court decided that in cases involving violations of rights guaranteed under the Fourth Amendment to the United States Constitution the rule which may have been stated by this Court in *Fahy* v. *Connecticut*, 375 U.S. 85 (1963), would govern the facts of this case, rather than rules which have been stated in two other cases by this Court, namely *Chapman* v. *California*, 386 U.S. 18 (1967), and *Harrington* v. *California*, 395 U.S. 250 (1969).

In any event, under any of the standards which the Court may wish to apply, the Constitutional error in this case cannot be said to be "harmless".

Facts concerning the illegal search and seizure are well stated by the Court of Appeals in its Opinion, reported at pages A4-A6 of the Appendix to this Petition and need not be restated here. Petitioner submits that the Court of Appeals was correct in deciding that the watch, ring, coin purse and keyring seized from a Memphis motel room were seized in violation of this Petitioner's rights under the Fourth Amendment to the United States Constitution.

Petitioner submits, first, that the Court of Appeals decided this case contrary to its own decisions. This Court has held in *Mapp* v. *Ohio*, 367 U.S. 643 (1963), that the prohibition against unreasonable searches and seizures as provided for in the Fourth Amendment to the United States Constitution was applicable to the States through the instrumentality of the due process clause of the Fourteenth Amendment to the United States Constitution—and this protection included the exclusion of evidence obtained in violation of the Fourth Amendment. Since that time, this Court has, it is respectfully submitted, created no exception to the exclusionary rule. This Court, in fact, left intact, the exclusionary rule last Term. *Stone* v. *Powell*, 96 S.Ct. 3037 (1976). Justice Powell's discussion of the Fourth Amendment in the latter case nowhere mentions a "harmless error" rule—rather, the Opinion emphasizes the fact that illegally seized evidence is an affront to judicial integrity. 96 S.Ct. at pp. 3046-3049. It is submitted that the prohibition against unreasonable search and seizure involves a constitutional right so basic to a fair trial that any infraction thereof can never be treated as harmless error. Thus, this Court has held in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) the violation of the right to counsel could not be treated as harmless error. Similarly, in *Payne* v. *Arkansas*, 356 U.S. 560 (1958), the Court held the prohibition against coerced confessions could never be treated as harmless error. Also, in *Toomey* v. *Ohio*, 273 U.S. 510 (1927), this Court has held that a violation of the right to an impartial judge could never be treated as harmless error.

Many lower courts, however, have read three decisions of this Court as announcing a "harmless error" rule with respect to errors of a constitutional dimension. The Court of Appeals in this case, for instance, held that *Fahy* v.

Connecticut, 375 U.S. 85 (1963) announced a rule that, in search and seizure cases where a defendant's Fourth Amendment rights have been violated, the standard of review "demands only that there be a reasonable possibility that the evidence complained of might have contributed to the conviction." (Opinion, at p. A7 of the Appendix hereto.)

It is respectfully noted, however, that this Court never reached the determination of "harmless error" in *Fahy*. In *Fahy*, there was no question under the facts of that case the evidence introduced was prejudicial, so that the Court did not decide whether it was possible for there to be "harmless error" in the introduction of the illegally seized evidence.[2]

Subsequently, in *Chapman* v. *California*, 386 U.S. 18 (1967), this Court adopted a different formulation governing review of errors of a constitutional magnitude. In *Chapman*, the Court held that a constitutional error is harmless where it is established beyond a reasonable doubt that the error did not contribute to the verdict. 386 U.S. at pp. 21-22. However, this case arose, not in the context of a Fourth Amendment violation, but rather in the context of an improper comment by the prosecutor on the accused's failure to testify, a Fifth Amendment matter. In still another context, this Court in *Harrington* v. *California*, 395 U.S. 250 (1969), appeared to change the rule yet again

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2. Among the matters considered as showing that the illegally seized can of paint and a brush were prejudicial were: (1) use of the evidence to corroborate the testimony of an officer as to the petitioner's presence near the scene of the crime at about the time that it was committed; (2) use of the evidence as a basis for opinion testimony to the effect that the evidence matched the markings of swastikas painted on the synagogue; (3) some indication of the use of the illegally seized items to obtain a confession; and (4) the cumulative effect of the evidence causing defendants to take the stand and admit their acts.

with respect to review of constitutional error by shifting the inquiry from whether the error contributed to the verdict to whether the untainted evidence was so overwhelming that the error was harmless beyond a reasonable doubt. At p. 254. See also *Milton* v. *Wainwright*, 407 U.S. 371 (1972); *Schneble* v. *Florida*, 405 U.S. 427 (1972).

The different formulations of this Court have resulted in different standards being applied in the lower courts. Thus, in *U.S.* v. *Anderson*, 500 F.2d 1311 (5th Cir. 1974), the Court followed the *Harrington* test, and said that evidence obtained by an illegal search and seizure was insignificant compared with the untainted evidence. In *Powell* v. *Stone*, 507 F.2d 93 (1974), reversed on other grounds in this Court, cited *supra*, the Court followed the *Chapman* standard, mixing it apparently with the *Fahy* test, and stated that the sufficiency of the evidence was not at issue. At page 99. The Court then suppressed the evidence because the evidence did in fact contribute to the conviction. Other courts, in the Fourth Amendment area, have followed the *Fahy* or *Chapman* test. *U.S.* v. *Basurto*, 497 F.2d 781, 791 (9th Cir. 1974); *Howard* v. *Rumble*, 452 F.2d 904 (3rd Cir. 1971); *Vaccaro* v. *U.S.*, 461 F.2d 626 (5th Cir. 1972); *Holloway* v. *Wolfe*, 482 F.2d 110, 116 (8th Cir. 1973).

Thus, it appears that the Court of Appeals in deciding this case in light of the *Fahy* standard may have been in error not only because this Court has never decided that the harmless rule applies in Fourth Amendment cases, but also was in error because it may not have decided the matter in accordance with the applicable "harmless error" rule, if such exists.

In any event, the facts of this case—regardless of the standard employed—clearly show that the evidence illegally seized and admitted into evidence against Petitioner was such that his Fourth Amendment rights were violated.

According to the Court of Appeals, the illegally seized evidence was harmless because "the coin purse found between the mattresses on the bed and car keys found in the suitcase did no more to incriminate defendant than it did the other occupants of the room. As a matter of fact the evidence admitted tends to exculpate more than implicate him. While it is true defendant was one of three occupants of the motel room he did not establish any proprietary interest in the bed where the jewelry and coin purse were found. If the evidence is to be accepted as it appears in the record the car keys were found in the suitcase which was the property of Richard Benjamin Dunn, and it was Mason who drove the automobile from Nashville to Memphis. On the other hand, the defendant's thumb print was found in the motel room occupied by the victim, Hazlewood. He was observed in an adjacent restaurant at the same time the victims were present there, only a few minutes before the homicide occurred. The death weapon was found in his possession. According to his co-defendants, it was he who brought Mr. Widener's automobile to the Driver Motel where they were staying in Nashville. It was he who insisted they leave Nashville; and he who produced the credit cards belonging to the victim, Widener, after they arrived in Memphis." (Appendix at pp. A7-A8).

However, the record reflects clearly that the case was a circumstantial one against this defendant. Moreover, the items illegally seized formed an important and necessary part of the evidence against this Petitioner. Thus, co-defendant Dunn testified that the suitcase which contained the keyring of one of the victims, which was found in the motel room, belonged to Taylor (BE pp.

451-452). Co-defendant Mason testified that the suitcase sure wasn't his (BE pp. 495-496). Dunn testified further that the coin purse containing the watch and ring found in the motel room wasn't his and that Taylor had a coin purse (BE p. 412). The murder weapon was found in the motel room, in plain view, which all three of the defendants occupied—the weapon was found by the door (BE pp. 308-309). The co-defendants' testimony was substantially impeached. Thus, both had plead guilty to being accessories after the murder in this cause (BE pp. 489, 381). Dunn was twice convicted before (BE p. 388). Mason had fled California to avoid charges there (BE p. 493) and had been at least arrested for armed robbery, possession of explosives, and fraudulent use of a credit card (BE pp. 493-494). The fingerprint evidence alluded to by the court was testified to by an "expert" who initially failed to finish high school and who had learned his art from a correspondence school (BE pp. 186-189). Identification by a witness of Taylor at the restaurant just prior to the murders was made in court without challenge by Taylor's trial counsel to the pretrial identification procedure (apparently no line-up was ever held), but in any event, this fact alone was certainly insufficient to charge or convict Taylor of the murders (BE pp. 227-235). Thus, whether the standard applied is *Fahy, Chapman,* or *Harrington,* the evidence complained of was certainly important and necessary to the State's case. Without this evidence, certainly the State's evidence was not "overwhelming".

2. The Opinion of the Court of Appeals (a) decided a federal question of substance in a way probably not in accord with an applicable decision of this Court, namely, *Pointer* v. *Texas,* 380 U.S. 400 (1965) in that the trial court in this cause erred in not striking the testimony

of witnesses Dunn and Mason in whole or in part after they asserted their Fifth Amendment rights not to incriminate themselves; (b) the Court of Appeals has decided a question of substance not heretofore decided by this Court, namely, whether it is proper to apply a harmless error rule, or whether the proper remedy is to strike the testimony of those witnesses who assert their Fifth Amendment rights while testifying against an accused.

Both Dunn and Mason gave extensive testimony and gave particular testimony concerning defendant's actions in Memphis, Tennessee and that the defendant had given them items recovered from the victims (BE pp. 405-421; 458-480).

During the direct examination of State's witness Dunn, the Assistant Attorney General asked Mr. Dunn a question with reference to his involvement in the purchases at the Sears & Roebuck Store in Memphis; Dunn asserted his Fifth Amendment right and the court sustained the Fifth Amendment privilege of Mr. Dunn (BE pp. 412, 413). Witness Dunn was asked on cross-examination why he left California in a hurry prior to coming to Tennessee. The court permitted the witness to assert his Fifth Amendment privilege with respect to that matter (BE p. 439). The court generally sustained the assertion of Dunn's Fifth Amendment privilege with respect to his activities in Memphis after the murders (BE pp. 443-450), to which ruling the Defendant excepted (BE pp. 447, 450). At the beginning of Mason's testimony, the court announced to the jury that an attorney representing Mr. Mason would be in the courtroom and that the attorney would be permitted "to stand here and make proper objections, if any, to the questions that the State's lawyer asked him, questions involving constitutional rights to not give evidence against himself." (BE p. 457). Thereafter, the court an-

nounced it would make the same ruling in Mason's case as it had made with respect to Dunn's testimony, the court stating "so you can understand, we'll try to follow the same outline of rulings and permit the questions or not as I did this other witness." (BE p. 458). During direct examination of witness Mason, the court sustained the assertion of the Fifth Amendment privilege by witness Mason with respect to his activities in the Sears & Roebuck Store in Memphis (BE p. 84) and with respect to the question whether Mr. Mason was arrested with a gun in Memphis (BE pp. 487-488). During cross-examination, the court sustained the apparent assertion of the privilege of Mason with respect to (a) whether or not he fled California because he was charged with armed robbery (BE p. 483) and (b) whether or not he had ever carried false identification in California (BE pp. 498-499). Clearly, the limitations on the inquiry by counsel below was constitutional error. The inquiries were relevant and material and were not obviated by other cross-examination.

This Court held in *Pointer* v. *Texas*, 380 U.S. 400 (1965), that the Sixth Amendment right of an accused to confront the witnesses against him is made obligatory upon the States by the Fourteenth Amendment. Thus, the right of confrontation is a federally protected right which the States must respect.

The right of cross-examination has been said by this Court to be at the core of the right of confrontation. See *Bruton* v. *U.S.*, 391 U.S. 123, 126 (1968); *Pointer*, *supra*. This Court has held, for instance, that the right of confrontation is violated when an accused is prevented from asking the correct name and address of the principal witness against him. *Smith* v. *Illinois*, 390 U.S. 129, 133 (1960). When the right of cross-examination is improperly abridged, serious constitutional error occurs. *E.g.*, *U.S.*

v. *Morris*, 485 F.2d 1385 at pp. 1386-87 (5th Cir. 1973). *U.S.* v. *Harris*, 501 F.2d 1, 8 (9th Cir. 1974) (cross-examination is principal means of testing witness reliability and credibility). See also *Park* v. *Huff*, 506 F.2d 849, 860 (5th Cir. 1975), *en banc, cert. denied*, 44 U.S.L.W. 3201 (Oct. 7, 1975) (confrontation clause guarantees rigorous and searching cross-examination).

The courts have held that when a witness refuses to answer questions on cross-examination, his testimony should be stricken in whole or in part. *U.S.* v. *Cardillo*, 316 F.2d 606 (2nd Cir. 1963); *U.S.* v. *Scott*, 511 F.2d 15, 20-22 (8th Cir. 1975). This the court did not do, but apparently relied on some "harmless error" rule.

It is respectfully suggested that this Court has never adopted a "harmless error" rule in this Sixth Amendment context. It has in fact not ruled directly what the remedy will be when a witness invokes the Fifth Amendment privilege. Lower courts have said the testimony should be stricken in whole or in part. Some, like the court below, say the error is "harmless". This Court should resolve the confusion in the courts below.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Criminal Appeals of Tennessee.

Respectfully submitted,

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APPENDIX

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE

NASHVILLE, OCTOBER SESSION, 1975

No. B-2751 DAVIDSON COUNTY CRIMINAL

MAURICE McKINNEY TAYLOR,
Plaintiff-in-Error,

v.

STATE OF TENNESSEE,
Defendant-in-Error.

Hon. John L. Draper, Judge

(Murder, 1st Degree, Two Counts)

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AFFIRMED

OPINION FILED: June 8, 1976

CHARLES H. O'BRIEN, JUDGE

OPINION

(Filed June 8, 1976)

Defendant was convicted on a two count indictment charging him with murder in the first degree in the deaths of James P. Widener and Mildred L. Hazelwood. He was sentenced to life imprisonment.

Defendant first says the trial court erred in allowing a medical examiner to give his opinion as to whether or not a bullet in one of the bodies had not only separated, but to also express an opinion that this bullet was designed to separate.

The transcript of the record and defense brief in this case do not comply with the rules of this court in that there has been no attempt to abridge the record (Rule 1); nor any effort made to omit from the Bill of Exceptions immaterial or uncontroverted matter which does not bear on the grounds assigned in the trial court for new trial (Rule 2); nor does the brief make reference to the pages of the record where the errors complained of appear (Rule 14). Nevertheless, despite these discrepancies we have examined this voluminous record carefully to determine if there was error in the trial proceedings.

The error first complained of by defendant did not actually occur. The medical examiner's qualifications as an expert were stipulated. In addition to the stipulations he testified he had been County Medical Examiner for approximately eight (8) years and in that capacity examined approximately fifty gunshot wounds annually. An attempt was made by State's counsel to elicit an opinion from the doctor to the effect that certain types of bullets would explode on impact. Although it is not so stated in the record, it is evident that the district attorney intended to relate this type bullet to those missiles extracted from the bodies of the victims. Defense counsel properly objected, and questioning in this vein was disallowed by the trial Judge. The doctor was allowed to testify that a projectile which had entered the brain of one of the victims had separated and was removed in two pieces. Also, that he removed part of a projectile from a head wound in the other victim. A hypothetical question was posed by the district attorney regarding the effect on the human body if a bullet exploded upon impact. Objection to this line of questioning was sustained. The doctor was allowed to testify about the effect upon a human body where a bullet separates upon impact. In light of the examination of the bodies of the victims by the doctor which disclosed that the death missiles had in fact separated upon impact, we do not find any abuse of the trial judge's discretion in allowing this testimony. We think the doctor was fully qualified to testify as he did on the basis of his experience as County Medical Examiner. Had the admission of this testimony been error, it could be no more than harmless error in view of the fact that a fire arms examiner for the Tennessee Bureau of Criminal Identification subsequently testified that the projectiles taken from the bodies of the victims had been fired from a weapon taken from defendant at the time of his arrest.

That these bullets were jacketed hollow points, the primary design and function of which was to cause the nose of the bullet to explode, expand, or mushroom upon impact.

By the second assignment it is urged that the trial court erred in qualifying a police officer as a fingerprint expert and allowing him to give expert testimony concerning fingerprints.

Testimony of Metro Police Officer Jimmy Rogers was offered for the purpose of making a comparison between a latent fingerprint found in a motel room occupied by one of the homicide victims and an identified fingerprint of the defendant. In a lengthy out-of-jury hearing the trial Judge determined that the witness was qualified as an expert to testify in the area in which his testimony was offered. It appears he was a graduate of an F.B.I. Improved Correspondence Course, had some three years experience and training under the supervision of an expert in the field, and had himself testified as an expert approximately ten times prior to the trial. His testimony regarding his area of expertise was subjected to rigid cross-examination. The qualification of an expert witness is a matter within the sound discretion of the trial court, and his decision in such matters will not be reversed on appeal, absent a clear abuse of discretion. *Fortune* v. *State*, 277 S.W.2d 381, 197 Tenn. 691; *Murray* v. *State*, 377 S.W.2d 918, 214 Tenn. 51. We find no reason to disturb the trial court's ruling on this issue.

Defendant complains that the trial court erred in allowing in evidence the fruits of a search conducted by the Memphis Police Department in a motel room, without the benefit of a search warrant.

Several days after the homicides the defendant was apprehended in Memphis, Tennessee in the company of

Richard Benjamin Dunn and Philip Glenn Mason, who were co-defendants prior to submission of guilty pleas to the lesser offense of accessories after the fact to murder. These three were arrested at the Cayce Motel in that city. They had endeavored to use credit cards owned by the deceased, James P. Widener, and had abandoned his automobile in which they had travelled to Memphis, after hearing news reports that a state-wide search was being conducted for them. Dunn and Mason were apprehended outside of the motel room occupied by defendant, a shoot-out occurred resulting in defendant's ultimate surrender. When defendant emerged from the motel room he was carrying a large red suitcase. He dropped a pistol inside the door which proved to be the murder weapon. Officers entered the motel room to determine if there was anyone else present, and for the further purpose of securing evidence in the room. The pistol was lying in a chair immediately inside the front door. At that time all three defendants were in custody and in the process of being transported to the Memphis Police Station. A thorough search of the motel room was made. A coin purse containing a diamond ring and a wrist watch was discovered under the mattress of one of the beds. These items were the property of the victim, Mildred Hazelwood. There were two suitcases in the room in addition to the one deposited by this defendant on the front porch. The keys to the car owned by the victim, James Widener, were found in one of the suitcases. Objection was made to the admission of this evidence because the police had not obtained a search warrant. After an out-of-jury hearing the trial Judge ruled that the evidence was admissible. He stated the basis for his reasoning to be that when police flush suspects in a murder case out of a house they have got to go in and see what they can find which might lead them to the murder. He reasoned that the

defendants had lost the care, custody and control of the room upon their arrest, and if the room had been sealed and a search warrant obtained there would have been no defendant present to serve a warrant on. That any warrant obtained had to be served on the operators of the motel, therefore, defendant had no standing to object to the search without a warrant. That the police had a duty to protect the defendant's property and the search made was in the nature of an inventory search.

Defendant cites only State law to sustain this assignment, but does seem to suggest that he relies on a violation of his rights under the Federal Constitution as well. We shall examine the question from both views since we have reached the conclusion that his honor the trial Judge did err in allowing the admission of the evidence complained of.

Without reiterating the reasons set forth by the trial Judge for the admission of the evidence, it is sufficient to say that the Tennessee Constitutional provisions against unreasonable searches and seizures are identical in intent and purpose with the 4th Amendment of the United States Constitution. (Constitution of Tennessee, Art. 1, Sec. 7) (U.S. Constitution, Amend. 4): *Sneed* v. *State*, 423 S.W.2d 857, 221 Tenn. 6; *Ellis* v. *State*, 364 S.W.2d 925, 211 Tenn. 321. The guidelines delineating the limit beyond which a warrantless search may not proceed are set out in *Chimel* v. *Calif.*, 89 S. Ct. 2034, 395 U.S. 755, 23 L.Ed.2d 686, which holds in summary that police officers must whenever practical, obtain advance judicial approval of searches and seizures through warrant procedures; that an arrest does not justify a routine search through closed or concealed areas in a room where the arrest occurs; that a search, under circumstances such as those existing in this case, may not extend beyond the search of the person arrested

and the area in his reach, if the search is to retain the distinction of being classified as reasonable. There was no justification, under the facts of this case, for the search into the suitcases, and between the mattresses on the bed by the Memphis police officers. The five basic exceptions to the requirement for a search warrant are (1) consent, (2) incident to a lawful arrest, (3) probable cause to search with exigent circumstances, (4) in hot pursuit, (5) a stop and frisk situation. None of these elements were present in this case. We can only view the search as illegal and improper.

It does not necessarily result however that the failure of the police officers to comply with the constitutional restrictions regarding searches and seizures requires an automatic reversal in this case. The harmless error statute in this State provides, in pertinent part, that no verdict or judgment shall be set aside or new trial granted on account of the improper admission or rejection of evidence unless, in the opinion of the appellate court to which application is made, after an examination of the entire record in the cause, it shall affirmatively appear that the error complained of has affected the results of the trial (T.C.A. Sec. 27-117). The Federal criteria demands only that there be a reasonable possibility that the evidence complained of might have contributed to the conviction. *Fahy* v. *Conn.*, 84 S.Ct. 229, 375 U.S. 85. It is plain that the trial Judge's error in admitting the evidence obtained in the unlawful search of the Memphis motel room did not violate either standard. The jewelry and coin purse found between the mattresses on the bed and the car keys found in the suitcase did no more to incimrinate defendant than it did the other occupants of the room. As a matter of fact the evidence admitted tended to exculpate more than implicate him. While it is true defen-

dant was one of three occupants of the motel room he did not establish any proprietary interest in the bed where the jewelry and coin purse were found. If the evidence is to be accepted as it appeared in the record the car keys were found in the suitcase which was the property of Richard Benjamin Dunn, and it was Mason who drove the automobile from Nashville to Memphis. On the other hand, defendant's thumbprint was found in the motel room occupied by the victim, Hazelwood. He was observed in an adjacent restaurant at the same time the victims were present there, only a few minutes before the homicides occurred. The death weapon was found in his possession. According to his co-defendants it was he who brought Mr. Widener's automobile to the Driver Motel where they were staying in Nashville. It was he who insisted they leave Nashville; and he who produced the credit cards belonging to the victim Widener, after they arrived in Memphis.

Finally, defendant says it was error to limit his right of cross-examination, and confrontation of State witnesses, Richard Benjamin Dunn and Phillip Glen Mason.

These witnesses were his co-defendants against whom the charges of 1st degree murder were stricken.

Defendant's brief correctly states the law to be that he has the right to cross-examine a witness who has testified to material matters so long as his cross-examination is relevant to a material issue in the law suit. *Monts* v. *State*, 379 S.W.2d 34, 214 Tenn. 171; *Davis* v. *State*, 212 S.W.2d 374, 186 Tenn. 545. We have examined this record carefully and find that both of these witnesses were cross-examined extensively, and that the cross-examination covered every relevant facet of their participation and knowledge of the circumstances surrounding the

charge against defendant. Both of these witnesses were represented by counsel at trial who advised them when it would be appropriate for them to assert their rights under the 5th Amendment of the United Constitution to avoid incriminating themselves in regard to other criminal matters in which they were involved. Except for a few limited instances the witnesses were required to respond to the cross-examination under the threat of contempt charges. Those times when the 5th Amendment was pleaded and sustained generally involved matters which were not material, and had no relevance to the issue at hand, that is the guilt or the innocence of this defendant. The only benefit to the defendant which might have been attained by requiring answers to those questions would have been to attack the credibility of the witnesses. This was otherwise successfully accomplished and any additional benefit which might have been attained by cross-examination certainly did not outweigh the right of these witnesses to avoid incriminating themselves in reference to other charges pending against them.

The judgment of the trial court is affirmed.

/s/ Charles H. O'Brien
Judge

CONCUR:

/s/ William S. Russell
Presiding Judge

/s/ William A. Harwell
Judge

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

DOCKET NUMBER B-2751 C.C.A.

DAVIDSON CRIMINAL

MAURICE MCKINNEY TAYLOR,
Petitioner,
VS.
STATE OF TENNESSEE,
Respondent.

ORDER

(Filed August 16, 1976)

On considering the petition for certiorari and briefs filed in this case and the entire record, the petition of Maurice McKinney Taylor is denied at cost of petitioner.

PER CURIAM

SUPREME COURT OF THE UNITED STATES

No. A-385

MAURICE McKINNEY TAYLOR,
Petitioner,
v.
TENNESSEE.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 14, 1976.

/s/ Potter Stewart
Associate Justice of the Supreme Court of the United States

Dated this 10th day of November, 1976.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

76-795

No. .....

MAURICE McKINNEY TAYLOR,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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STATE OF TENNESSEE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The respondent respectfully prays that the petition for writ of certiorari to review the judgment of the Court of Criminal Appeals of Tennessee be denied.

STATEMENT OF THE CASE

Pursuant to U. S. Sup. Ct. Rule 40.3, 28 U.S.C.A., respondent submits the following statement of the case as only that deemed necessary in correcting any inaccuracy or omission in the statement of the case set forth in the petition for a writ of certiorari.

Mr. James Hunnicutt testified that he was engaged in a firearms business in Atlanta, Georgia (R. 6). On November 16, 1973, he refused to sell firearms to Taylor, the petitioner herein, and two other individuals when they failed to present proper identification (R. 7). On November 17, 1973, he sold to one of Taylor's companions of the previous day three pistols which he identified at trial by serial number (R. 7, 19-26).

On the night of the double homicide, a fingerprint was lifted from a plastic glass in the motel room of one of the victims (R. 121, 124). That print was compared to the prints of Taylor by an identification technician who testified at trial that the lifted print matched the left thumb print of Taylor (R. 174).

The morning of November 29, 1973, Taylor and his two companions were present at the American Airlines Ticket office at a hotel in Memphis, Tennessee, where one of his companions made payment for an airline ticket with a Master Charge card issued in the name of James Widener, one of the homicide victims (R. 248, 249). At 2 p.m. on November 29, 1973, Taylor and his companions were present in a Memphis Sears & Roebuck Store where one of his companions made purchases with a Sears revolving charge card issued in the name of James Widener (R. 256-262).

Prior to the shoot-out at a hotel in Memphis, Tennessee, police officers arrested Taylor's two companions (R. 293). Lt. James L. Harrison arrested Dunn at approximately 3 p.m. on November 29, 1973, after Dunn walked from room number 11 at the Cayce Motel (R. 290-293). Lt. Harrison's partner, Sgt. Sherman Chambers, arrested Mason at the same time and place (R. 339-341). After Dunn and Mason were in custody, the shoot-out began when someone in room 11 at the motel pointed a pistol in the direction of Lt. Harrison and discharged it (R. 296, 297). Numerous law enforcement officials arrived at the motel during the lengthy gun battle which ensued (R. 298). The

gun battle ended after several canisters of tear gas were projected into the motel room and Taylor was forced outside (R. 298, 299). As Taylor exited the motel room, he dropped a pistol just inside the door when he was confronted by a uniformed officer wielding a shotgun (R. 299).

Taylor's pistol was removed from the chair just inside the doorway to room number 11 at the Cayce Motel when the gun battle ended and was admitted into evidence at trial without objection (A. 307-312). The pistol was identified as having fired the three bullets which were recovered from the bodies of the homicide victims (R. 368).

Richard Benjamin Dunn was called as a witness by the State (R. 380). Dunn had the services of retained counsel at the hearing and several times attempted to invoke the Fifth Amendment privilege against self-incrimination. Most often the trial judge disallowed Dunn's assertion of the Fifth Amendment and required him to answer the questions (R. 386, 387, 388, 389, 397). Dunn corroborated the testimony of the gun shop owner as to the purchase of the three pistols and testified that he had given a particular pistol to Taylor (R. 392, 393). Dunn's testimony placed himself, Philip Mason and Maurice Taylor in Nashville, Tennessee, from the 24th to approximately 10:30 p.m. on the 27th of November, 1973 (R. 396, 397, 403, 405). Dunn testified that they left Nashville at Taylor's insistence and over his and Mason's objections (R. 405). They departed Nashville in a blue Lincoln Continental that Taylor told them he had purchased (R. 406). Taylor also said he had obtained some credit cards which Dunn later observed in Taylor's possession and with the name of James P. Widener imprinted on them (R. 406, 407).

On cross-examination, Dunn admitted that he had been indicted by the Davidson County Grand Jury for first degree murder (R. 422). Dunn admitted further that during the week of trial he had confessed to being an accessory after the fact to

murder in the first degree and had received a sentence of from four to seven years (R. 422). Dunn testified he had heard of people being sentenced to confinement for 99 years for the offense of first degree murder and that he had been indicted and awaiting trial for first degree murder for approximately eight and a half months before confessing to being an accessory and receiving a sentence of from four to seven years (R. 424). He admitted he had been convicted in California for the offenses of joyriding and possession of a firearm, a hand pistol (R. 425).

During the course of cross-examination, Dunn's counsel asserted the Fifth Amendment privilege to a question regarding why Dunn left California (R. 426, 427). In response to the assertion of the Fifth Amendment privilege, Taylor's attorney stated, "That answer is satisfactory" (R. 427). Taylor's counsel attempted to question Dunn relative to the purchase of pistols in Atlanta and Dunn's attorney asserted the Fifth Amendment privilege (R. 428, 429, 430). The trial judge threatened Dunn with contempt and required him to answer the questions relating to purchase of the pistols (R. 428, 429, 430).

The only question of Dunn to which the assertion of the Fifth Amendment privilege had been allowed during direct examination related to why he and Mason went to the Nashville Public Library (R. 400). The trial judge allowed Dunn to invoke the Fifth Amendment privilege relative to those same questions on cross-examination (R. 435-437). However, Philip Glen Mason as a witness answered questions relative to why he and Dunn were at the library and testified that they were researching for new identification to change his identity (R. 497). A question by Taylor's counsel as to when Dunn left California was withdrawn when the Fifth Amendment privilege was asserted (R. 439, 440).

Taylor's attorney withdrew a question relative to Dunn carrying a pistol when Dunn's counsel announced that Dunn was under a three count indictment in Memphis including a felony

firearm count (R. 445, 446). Dunn was not required to answer questions relative to using credit cards in the Memphis Sears & Roebuck Store when Dunn's counsel announced that one of the other charges in the indictment was for fraudulent use of credit cards at the Memphis Sears & Roebuck Store (R. 446, 447). Counsel for Dunn announced that there were activities in Memphis about which he did not object to Dunn testifying and that there were only certain activities in Memphis which he would advise Dunn not to answer (R. 448). Taylor's attorney stated that he thought he was entitled to ask any questions and objected to the Court's not allowing him to do so (R. 448). The trial judge overruled a subsequent assertion of the Fifth Amendment privilege and required Dunn to answer a question as to whether or not he had lied in efforts to purchase the three guns (R. 452, 453).

The direct testimony of Philip Glen Mason was essentially the same as that of Dunn; however, Mason's counsel, who was present to advise him during the course of his testimony, did not assert the Fifth Amendment privilege as often as was done during the course of the testimony of Dunn. Mason testified that he left California because he had been arrested and was facing charges of armed robbery (R. 490-493). Mason testified he was not wanted in California with Dunn for fraudulent use of credit cards (R. 494). However, Mason admitted he was wanted in California for possession of explosives (R. 494). Mason testified that he owned a red checked bag (R. 495). The trial judge permitted assertion of his Fifth Amendment privilege to a question whether Mason had used false identification in California upon the representation that Mason was going to be returned to California (R. 498, 499). Mason testified further that he left California while his trial for possessing explosives was ongoing (R. 504, 505). The cross-examination of Mason showed that Dunn and Mason had been confined together for several months prior to Taylor's trial and had discussed the case (R. 508, 509, 510).

BRIEF

Respondent submits that the decision of the Court of Criminal Appeals of the State of Tennessee in this case is correct and should not be reviewed and reversed for the following reasons:

I. Response to Question Presented Number 1.

A. A Conviction May Be Affirmed When Items Seized During a Search Conducted Without a Warrant in Violation of the Fourth Amendment of the United States Constitution Were Admitted Into Evidence Contrary to the Holding in Mapp v. Ohio, 367 U.S. 643 (1963), if the Admission of Such Evidence Was Harmless Error.

In at least three cases, this Honorable Court has applied the "harmless error rule" upon consideration of the admission of evidence seized in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States. The earliest application was in *Stoner v. State of California,* 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964), where the Court was presented with the introduction of evidence seized in an unlawful search of a hotel room. The Court, citing *Fahy v. Connecticut,* 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963), stated as follows:

> There is thus at least "a reasonable possibility that the evidence complained of might have contributed to the conviction." 376 U.S. at 490, 84 S.Ct. at 893.

The second application of the harmless error rule occurred in *Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), *rehearing denied,* 400 U.S. 856, 91 S.Ct. 23, 27 L.Ed.2d 94 (1970). Upon considering the admissibility of .38 caliber ammunition seized in a search, the Court in *Chambers* stated:

> Both the District Court and the Court of Appeals, however, after examination of the record, found that if there was error in admitting the ammunition, the error was harmless beyond a reasonable doubt. Having ourselves studied this record, we are not prepared to differ with the two courts below. See Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969). 399 U.S. at 54, 90 S.Ct. at 1982.

One year later, in the case of *Whitley v. Warden, Wyoming State Penitentiary,* 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971), the Court reviewed a "half-hearted attempt to argue that the introduction of the illegally seized evidence was harmless error" and found that the error could not be said to be harmless under the "applicable standards," citing *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and *Harrington v. California,* 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969). 401 U.S. at 569, n. 13, 91 S. Ct. at 1037, n. 13.

The harmless error rule has previously been recognized by this Honorable Court as proper for application to the introduction as evidence items seized in violation of a defendant's Fourth and Fourteenth Amendments constitutional rights. It is submitted that this Court should not now reconsider its earlier rulings and deny application of the harmless error rule in the circumstances of the case under consideration.

The harmless error rule is a reasonable and valid rule which is recognized and applied in every circuit court of appeals to the admission into evidence of items seized in violation of the Fourth and Fourteenth Amendments. *United States v. Anderson,* 533 F.2d 1210 (D.C. Cir. 1976); *Nelson v. Moore,* 470 F.2d 1192 (1st Cir. 1972), *cert. denied,* 412 U.S. 951 (1973); *United States v. LaVecchia,* 513 F.2d 1210 (2nd Cir. 1975); *United States ex rel. Riffert v. Rundle,* 464 F.2d 1348 (3rd Cir. 1972),

cert. denied, 415 U.S. 927 (1973); *Creasy v. Leake*, 422 F.2d 69 (4th Cir. 1970); *United States v. Scheffer*, 463 F.2d 567 (5th Cir. 1972), *cert. denied*, 409 U.S. 984 (1973); *United States v. West*, 486 F.2d 468 (6th Cir. 1973), *cert. denied*, 416 U.S. 955 (1974); *United States v. Quintana*, 508 F.2d 867 (7th Cir. 1975); *Ricehill v. Brewer*, 459 F.2d 537 (8th Cir. 1972); *Dean v. Hooker*, 409 F.2d 319 (9th Cir. 1969); *United States v. Quinones-Gonzalez*, 452 F.2d 964 (10th Cir. 1971).

B. The Standard for Determining Whether the Admission Into Evidence of Items Seized During a Search Conducted in Violation of the Fourth and Fourteenth Amendments Is Harmless Has Been Set Forth by This Court in Harrington, Chapman and Fahy.

This Court has three times stated a rule for determination of harmless error when confronted with an error of constitutional magnitude. Respondent submits that these three pronouncements are of sufficiently identical rules so that the determination of harmless constitutional error has been consistent since the first ruling in 1963. Alternatively, respondent submits that the initial pronouncement is more favorable to a criminal defendant than the subsequent pronouncements. Application of the first standard, which was applied by the Tennessee Court of Criminal Appeals in the instant case, results in a most sound determination of harmless error upon consideration of a constitutional error.

In *Fahy v. Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed. 2d 171 (1963), the Court held the admission of evidence obtained in the course of an illegal search to not be harmless error. The standard applied was "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." 375 U.S. at 86-87, 84 S.Ct. at 230. In the following year the Court again applied the standard set forth in

Fahy and again found the admission of such evidence to not be harmless error. *Stoner v. State of California*, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964).

Thereafter, in a case decided in 1967, the Court did hold admission of items seized in an unconstitutional search to be harmless error. In *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the Court restated the rule announced in *Fahy* and then, expressly adhering to the *Fahy* decision, held, "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 24, 87 S.Ct. at 828. In *Chapman* the Court stated that there was "little, if any, difference" in the Chapman and Fahy standards but that the standard of "reasonable doubt" would be more familiar to and easier to apply by all courts.

The Court again considered this question in *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969). The majority in Harrington wrote that they were not departing from *Chapman* or diluting it, but only reaffirming it when they stated:

> The case against Harrington was so overwhelming that we conclude that this violation of *Bruton* was harmless beyond a reasonable doubt, unless we adopt the minority view in *Chapman* . . . that a departure from constitutional procedure should result in an automatic reversal, regardless of the weight of the evidence. 395 U.S. at 254, 89 S.Ct. at 1728.

A dissent in Harrington by Mr. Justice Brennan joined by the Chief Justice and Mr. Justice Marshall, expressed the belief that the majority had overruled *Chapman* by considering the issue of the substantiality of the evidence and not the effect on the jury's decision caused by the tainted evidence. *Harrington v. California, supra*, 395 U.S. at 256, 89 S. Ct. at 1729 (dissenting opinion).

Respondent submits that the standard set forth in *Fahy, Chapman,* and *Harrington* for determining whether constitutional error is harmless has been the same standard verbalized in varying terms. Therefore, application of the Fahy standard by the Court of Criminal Appeals of Tennessee in the instant case was proper. However, if this Court should rule that the standards are not the same, respondent submits that the standard set forth in *Fahy,* no reasonable possibility the evidence contributed to conviction, is the most beneficial to criminal defendants. Therefore, a determination of harmless error under the *Fahy* standard would satisfy the standards in both *Chapman* and *Harrington. See Harrington v. California, supra,* 395 U.S. at 255, 89 S.Ct. at 1729 (dissenting opinion).

C. **The Admission Into Evidence of Items Seized During a Search Conducted in Violation of Petitioner's Fourth and Fourteenth Amendment Rights Was Harmless Error.**

The items which were seized in the search of the motel room after the shoot-out with Taylor consisted of a change purse discovered under a mattress on one of the beds and a key ring found in a suitcase (R. 312-314). The change purse contained a diamond ring and a lady's watch which had been previously identified as belonging to the female victim and the key ring contained keys to operate the male victim's automobile (R. 312-314). It is the admission of these items which was held to be harmless error by the court below. Respondent submits that the lower court's ruling was correct.

A brief summary of the incriminating evidence not tainted by a search of the motel room is offered in support of the lower court's ruling.

Beginning on November 16, 1973, petitioner Taylor and two male companions were in Atlanta, Georgia, attempting to buy

pistols (R. 7). The next day at a store where their previous attempts had been unsuccessful, one of Taylor's companions purchased three pistols, including the pistol which became the murder weapon in this case (R. 7, 9, 14, 15, 19-26, 268).

On November 27, 1973, petitioner Taylor was present at the Pitt Grill in Nashville, Tennessee, the same time the two to-become murder victims were there which was approximately one hour before their gunshot bodies were discovered a short distance from that restaurant and their motel (R. 50-57, 227-235). A short period of time after the victims' bodies were discovered, petitioner Taylor's left thumb print was discovered on a plastic glass in one victim's motel room (R. 119-124, 174).

Beginning in the morning hours of November 29, 1973, Taylor and his two companions were seen together in Memphis, Tennessee, using credit cards issued to one of the homicide victims and in the possession of and operating that deceased's automobile (R. 256-285). In the afternoon of November 29, 1973, authorities took Taylor's two companions into custody and discovered a pistol on each of them (R. 292-295, 340, 341). Immediately thereafter, a shoot-out occurred between Taylor and Memphis authorities and the pistol confiscated after Taylor surrendered was the murder weapon (R. 297-299, 307-309, 368).

Taylor's two companions in November, 1973, testified that approximately 10:30 p.m. on November 27, 1973, Taylor came into the motel room they were sharing in Nashville and announced that they were leaving town (R. 397, 398, 403, 404, 469, 476, 477). They testified that Taylor was excited and, even though they objected, he convinced them to leave Nashville (R. 404, 405, 477, 478). The three went to Memphis in a blue Lincoln Continental (the vehicle of one of the homicide victims) which Taylor told them he had purchased (R. 406, 479, 480). They testified further that Taylor was then in

possession of credit cards imprinted with the name "James P. Widener" (R. 407, 481, 482).

The brief statement of the evidence set out hereinbefore shows that Taylor was in a public place in the presence of the victims only minutes before the murders. He apparently was in the motel room of one of the victims. Taylor was in possession of the murder weapon both before and after the homicide. Minutes after the homicides occurred, he was excited and anxious to leave Nashville. At that time, he was in possession of the automobile and credit cars belonging to one of the murder victims.

Respondent respectfully submits that the untainted incriminating evidence is overwhelming and would result in a jury verdict of guilty unless the jury acted arbitrarily. Therefore, admission of the watch and ring belonging to the second homicide victim and admission of the keys which operated the automobile belonging to James P. Widener was harmless error as found by the Court of Criminal Appeals of Tennessee.

D. **The Decision of the Court of Criminal Appeals of Tennessee Should Not Be Reviewed and Reversed Because the Exclusionary Rule as Applied to the States in Mapp v. Ohio Should No Longer Be Followed and Should Either Be Overruled or Modified So as to Make Admissible the Items Seized in the Instant Case.**

All courts should seek to conduct criminal proceedings so that no innocent man suffers for want of a fair trial. However, it is submitted that every court also shares the duy to see that no guilty person escapes justice through a mere irregularity or technicality which in no way affects the determination of guilt or innocence. It is submitted that this Court should no longer require the states to adhere to the exclusionary rule in the absence of evidence to warrant the rule which presently is still unsupported by convincing evidence. *See United States v. Janis*, — U.S. —, 96 S.Ct. 3021, 3027, — L.Ed.2d — (1976).

The costs of applying the exclusionary rule have been recognized as substantial and application of the rule has often subverted criminal trials. *Stone v. Powell*, 428 U.S. —, 96 S.Ct. 3037, 3049, 48 L.Ed.2d — (1976). The respondent submits that in no way should the exclusionary rule be applied in the instant case so as to require that the conviction of petitioner Taylor be reversed.

II. **Response to Question Presented Number 2.**

A. **The Trial Court Properly Exercised Discretion in Not Striking the Testimony of Witnesses Dunn and Mason in Whole or in Part in Response to Assertion of Their Fifth Amendment Rights Not to Incriminate Themselves.**

It is widely recognized that a trial court is not required to strike testimony, in whole or in part, of a government witness asserting his Fifth Amendment privilege against self-incrimination in a criminal trial. Such recognition is expressed in *United States v. Newman*, 490 F.2d 139 (3rd Cir. 1974), where the Court also cites decisions filed in six additional circuits recognizing this same principle. 490 F.2d at 145. And, in *United States v. Rogers*, 475 F.2d 821 (7th Cir. 1973), the Court noted that a witness' refusal to answer questions upon asserting the Fifth Amendment privilege "may, but need not necessarily, violate the defendant's Sixth Amendment right as to part or all of the witness' testimony." 475 F.2d at 827.

However, the question presented does appear to be one not heretofore decided by this Court. Even though, this Honorable Court has noted that the constitutional right of confrontation

and cross-examination is not absolute. In *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), after noting that the constitutional right of confrontation was an essential and fundamental requirement for a fair trial, this Court stated:

> Of course, the right to confront and cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. *E.g.*, Mancusi v. Stubbs, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 292 (1972). But its denial or significant diminution calls into question the ultimate "integrity of the fact-finding process" and requires that the competing interest be closely examined. *Berger v. California*, 393 U.S. 314, 315, 89 S.Ct. 540, 541, 21 L.Ed.2d 508 (1969). 410 U.S. at 295, 93 S.Ct. at 1046.

Thus cases of conflict between a witness' Fifth Amendment privilege against self-incrimination and a defendant's Sixth Amendment right to confrontation and cross-examination require consideration of the integrity of the fact-finding process.

It is submitted that the authoritative case on this point is *United States v. Cardillo*, 316 F.2d 606 (2nd Cir. 1963), *cert. denied, Cardillo v. United States*, 375 U.S. 822, 84 S.Ct. 60 (1963) and *Margolis v. United States*, 375 U.S. 822, 84 S.Ct. 60 (1963), *rehearing denied, Cardillo v. United States*, 375 U.S. 926, 84 S.Ct. 263 (1963). The circuit court there stated:

> Since the right to cross-examine is guaranteed by the Constitution, a federal conviction will be reversed if the cross-examination of government witnesses has been unreasonably limited. . . . However, reversal need not result from every limitation of permissible cross-examination and a witness' testimony may, in some cases, be used against a defendant, even though the witness invokes his privilege against self-incrimination during cross-examination. In

> determining whether the testimony of a witness who invokes the privilege against self-incrimination during cross-examination may be used against the defendant, a distinction must be drawn between cases in which the assertion of the privilege merely precludes inquiry into collateral matters which bear only on the credibility of the witness and those cases in which the assertion of the privilege prevents inquiry into matters about which the witness testified on direct examination. Where the privilege has been invoked as to purely collateral matters, there is little danger of prejudice to the defendant and, therefore, the witness' testimony may be used against him. . . . On the other hand, if the witness by invoking the privilege precludes inquiry into the details of the direct testimony, there may be a substantial danger of prejudice because the defense is deprived of the right to test the truth of his direct testimony and, therefore, that witness' testimony should be striken in whole or in part. . . . 316 F.2d at 611 (authorities omitted).

In *Cardillo*, the testimony of two individuals was under consideration. The court found that the limitations on cross-examination of one of the witnesses related only to collateral matters which concerned his credibility as a witness and the limitation was proper. However, as to the second witness, the court concluded that the limitation was improper because it related to the guilt of the defendant.

The second most authoritative decision on this issue is *Fountain v. United States*, 384 F.2d 624 (5th Cir. 1967), *cert. denied, Marshall v. United States*, 390 U.S. 1005, 88 S.Ct. 1246, 20 L.Ed.2d 105 (1968). The court there noted that resolving the conflict between a witness' Fifth Amendment privilege and a defendant's Sixth Amendment right to confrontation and cross-examination began with two inquiries which are whether the Fifth Amendment privilege could be properly invoked, and if so, whether, even with this restriction, the direct testimony could

still be considered by the jury. 384 F.2d at 627. The court noted that if the limitation on cross-examination deprived a defendant of testing the truth of the direct testimony that the portion of the direct testimony which could not be subjected to sufficient inquiry should be struck. However, the court concluded that "the question in each case must finally be whether defendant's inability to make the inquiry created a substantial danger of prejudice by depriving him of the ability to test the truth of the witness' direct testimony." 384 F.2d at 628.

The standards for considering the integrity of the fact-finding process when a defendant's right of confrontation has been limited by a prosecution witness successfully asserting his Fifth Amendment privilege as stated in the cases of *Fountain* and *Cardillo*, both *supra*, have been recognized and applied in various circuits. *E.g., United States v. Gould*, 536 F.2d 216 (8th Cir. 1976); *United States v. Liddy*, 509 F.2d 428 (D.C. Cir. 1974) (en banc); *United States v. Newman*, 490 F.2d 139 (3rd Cir. 1974); *United States v. Stephens*, 492 F.2d 1367 (6th Cir. 1974); *United States v. Rogers*, 475 F.2d 821 (7th Cir. 1973).

At trial where the question is first presented, a witness who may properly invoke the Fifth Amendment privilege against self-incrimination should be called as a witness unless his answers to all relevant questions could subject him to prosecution. *United States v. Melchor Moreno*, 536 F.2d 1042 (5th Cir. 1976). In those instances, the witness should be required to answer all relevant questions to which the judge determines that he may not properly assert the Fifth Amendment privilege. *United States v. Melchor Moreno, supra; United States v. Anglada*, 524 F.2d 296 (2nd Cir. 1975). The trial judge acted accordingly in the case under consideration.

It is submitted that application of the *Fountain* and *Cardillo* standards to the particular facts and circumstances present in

the instant case results in a determination that the trial judge properly allowed the witnesses Dunn and Mason to assert their Fifth Amendment privilege against self-incrimination and thereby limit petitioner's Sixth Amendment right of confrontation and cross-examination and that the trial judge so limited the exercise of the Fifth Amendment privilege by Dunn and Mason that it did not affect the integrity of the fact-finding process. A review of the limited use of the Fifth Amendment privilege which was permitted by the trial judge is disclosed by the addition to the Statement of the Case contained hereinbefore.

B. No Harmless Error Rule Was Applied in the Instant Case to the Conflict Between the Witness' Fifth Amendment Privilege and the Petitioner's Sixth Amendment Right to Confrontation and Cross-Examination.

The proper test for determining conflicts between a witness' Fifth Amendment privilege again self-incrimination and a defendant's Sixth Amendment right to confrontation does not involve a determination of whether harmless error is present. As noted in the preceding discussion, the proper standard determines whether or not there has been a deprivation of a defendant's right to determine the truth of the prosecution witness' direct testimony. If a determination of the truth was not reached in the trial court, reversal is required. This standard for review is of the integrity of the fact-finding process and no application of a harmless error rule is applied when the court determines that there was no valid fact-finding process.

Although some courts do speak of harmless error in considering this issue, *e.g., United States v. Melchor Moreno*, 536 F.2d 1042 (5th Cir. 1976), and *Hoover v. Beto*, 467 F.2d 516 (5th Cir. 1972), *cert. denied*, 409 U.S. 1086, 93 S.Ct. 702 (1972), it is submitted that the proper determination, as set forth above, is consideration of the integrity of the fact-finding process, even if a court may express its decision as finding "harmless error."

The lower court in this case reviewed the evidence to determine if the fact-finding process had been impaired. The court made no finding of harmless error relative to this question and affirmed the conviction only after a full review of the trial proceedings.

CONCLUSION

For the foregoing reasons, the respondent respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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